CHILMINGTON GREEN, ASHFORD ROAD, GREAT CHART, TN26 2BQ

S106B APPLICATION TO MODIFY/AMEND THE S106 AGREEMENT DATED 27 FEBRUARY 2017 (AS AMENDED) (PLANNING APPLICATION NUMBER 12/00400/AS)

PINS Ref: APP/W2275/Q/23/3333923 and APP/E2205/Q/23/3334094

Kent County Council – Topic Paper – Clause 28 Indexation

---

1. Introduction

1.1 Referring to the Appellants' Annex A 106 Modifications Table [CD2/22] as follows, the Appellants seek to modify the provisions relating to Index Linking at clause 28 of the section 106 agreement dated 27 February 2017 (as amended) ("S106") [CD1/14 - CD1/16] as follows:

1.1.1 Request 5 – Clause 28 – Modification of all references to 'index linking' to 'Index Linking'.

1.1.2 Request 6 – Clause 28 – Modification of the base date for Indexation from April 2014 or the second quarter of 2014 to August 2018 or the third quarter of 2018 (i.e. the commencement of house building on site).

1.1.3 Request 6 – Clause 28 – Modification through the addition of the following wording: *"Where any Index Linked payment required to be made under this Agreement by virtue of the Indexation results in that payment exceeding the cost of the item for which it is to be paid, the amount payable shall be reduced accordingly and only the amount reduced as aforesaid shall be payable."*

1.2 The Appellants have stated that:

1.2.1 a base date of April 2014 leads to "*payments and contributions in excess of those that would be required to mitigate the impact of the Development … if these section 106 payments and capital contributions* *were calculated at today's date they would be significantly lower than the amounts plus indexation … falling due"*.

1.2.2 The Appellants go on to say that *"These inflated payments are not only unjustified but are serving materially to undermine the viability of the Development."*

1.3 Kent County Council ("KCC") will address viability within a separate proof of evidence.

1.4 The Appellants have provided no evidence to support their claims.

1.5 KCC disagrees with the assertion in para 1.2.1 . The indexation appropriately reflects real world increased costs over time and it is wrong to claim that the same mitigation if required today would be at substantially lower cost than the inflated figures. KCC further does not accept the Appellant's case on viability. Further, in so far as the indexation applies to obligations which are necessary to make the development acceptable irrespective as to viability, the outcome on viability cannot be a justification for adjusting the indexation. Further, where the indexation applies to obligations where KCC has already incurred the expenditure, there is no power and/or it is inappropriate in principle to vary the obligations retrospectively. In all respects, the indexation clause serves a useful purpose of ensuring the costs of delivering necessary infrastructure are met by the developer. The revised indexation would not do so equally well.

2. Policy Context

2.1 Indexation is a standard and uncontroversial feature of s106 agreements, especially where financial contributions are agreed. It helps to protect local authorities from the eroding effects of inflation and ensures that agreed contributions maintain their value over time, enabling local authorities to deliver the necessary infrastructure to support and make a development acceptable in planning terms. Indexation is thus a necessary part of such s.106 obligations - lack of indexation would mean that the development did not bear the cost of infrastructure necessitated by it. The indexation must be done via an appropriate index and from the base date of the relevant cost.

2.2 The national, local and KCC policy documents which support the requirements for the individual contributions in the S106 to which indexation relates are set out in the relevant Proofs of Evidence and Topic Papers.

2.3 **Kent County Council (KCC)**

KCC's policy for seeking indexation of payments to ensure that they continue to cover the actual cost of delivering infrastructure and thus support new developments is set out in its Developer Contributions Guide 2023 (para 5.5) [CD4/3].

3. Purpose

3.1 Purpose served by the s106 obligation

The purpose of indexing financial contributions payable by the Owners and Paying Owners, commencing in April 2014, is to safeguard their real value. This ensures the development adequately mitigates its impact on the local community over the long term. Indexation is a standard and widely accepted practice within section 106 agreements, particularly concerning financial contributions. By incorporating indexation, local authorities are protected from the erosive effects of inflation. This mechanism ensures that agreed contributions retain their purchasing power over time, enabling the delivery of necessary infrastructure to support the development and maintain its acceptability within the planning framework.

3.2 Why is that purpose useful at the current time?

3.2.1 The Development is a long-term project, which has been discussed with the local authorities since approximately 2010. KCC shared its original heads of terms for the contributions that would be required by KCC with Ashford Borough Council ("ABC") as far back as November 2013. At that point, KCC requested that indexation be backdated to August 2013, the date at which KCC assessed and set the section 106 contribution rates for this Development (i.e. when the original planning balances were struck). However, draft heads of terms were first shared by the Paying Owners with ABC in April 2014 and this date was subsequently agreed for the Indexation base date. It then took almost a further 3 years to conclude the s106 Agreement, on 27 February 2017. The short point is that the contributions which KCC sought were based on August 2013 costs. The question is whether the indexation since 2014 now means that the obligations deliver more than the current cost of the relevant works.

3.2.2 Applying indexation to the S106 contributions serves a useful purpose for the following reasons:

(a) Maintaining Value

(i) Inflation erodes the purchasing power of money over time. Indexation ensures that the agreed-upon contributions maintain their real value, allowing KCC to effectively deliver the necessary infrastructure or community facilities for this Development as planned and as determined to be necessary in planning terms.

(ii) Without indexation, the value of the contributions could significantly diminish, rendering them insufficient to fund the intended projects and/or infrastructure to the specification assumed at the outset. Consequently, projects and infrastructure would either not be delivered, would be delivered to a lower specification or the gap in funding (see paragraph 3.3.5) would fall to the public purse.

(b) Fairness and Predictability

Indexation provides a degree of fairness for both KCC and the Appellant.

(i) It acknowledges that the costs of delivering the required contributions may increase due to inflation between the time the S106 was signed and the time the contributions are actually paid.

(ii) It also provides predictability for both parties, as the mechanism for adjusting contributions is clearly defined within the S106. Accordingly, KCC is able to plan for the delivery of the required projects and/or infrastructure.

As the provider of significant infrastructure provision for this Development, it is essential that contributions maintain their purchasing power.

3.2.3 Indexation serves a crucial purpose in this long-term Development, which has been under discussion since 2010. By incorporating Indexation from April 2014, the agreed-upon contributions maintain their real value over time. This protects KCC from the erosive effects of inflation, ensuring that the necessary infrastructure and community facilities can be delivered as planned and as determined to be necessary within the planning process. Without Indexation, the value of contributions could significantly diminish, potentially jeopardising the delivery of essential projects and infrastructure and shifting the financial burden onto the public purse. Furthermore, Indexation promotes fairness and predictability for both KCC and the Appellants. It acknowledges the potential for increased costs due to inflation and establishes a clear mechanism for adjusting contributions, enabling both parties to plan and budget accordingly. As a significant provider of infrastructure for this Development, KCC relies on Indexation to ensure that contributions retain their purchasing power and effectively support the long-term delivery of this infrastructure.

3.3 **Would the obligations serve that purpose equally well if they had effect subject to the proposed modification?**

3.3.1 The Appellants propose to amend the base date for Indexation from April 2014 or the second quarter of 2014 to August 2018 or the third quarter of 2018. Their rationale is that a base date of April 2014 leads to "*payments and contributions in excess of those that would be required to mitigate the impact of the Development"*, for which, no evidence has been provided. They add that that this obligation is impacting the viability of the Development.

3.3.2 Viability will be dealt with via a separate Proof of Evidence from the County Council's Viability Expert Witness. **This paper deals only with the argument that Contributions are in excess of that required.**

3.3.3 The Appellants have previously sought to modify the base date for Indexation from April 2014 to August 2018 within their first[1] and second[2] requests to amend the S106. Following determination of the second request, the Appellants applied to challenge the decision via Judicial Review. During the Renewal Hearing[3] Mrs Justice Lieven stated in her judgment [CD12/11] that the local authorities'[4] decision to refuse the Appellants' request to amend the based date was not irrational as the Appellants had asserted. She stated at paragraphs 18 and 19:

[1] Submitted to Ashford Borough Council on 20 August 2020.
[2] Submitted to Ashford Borough Council (ABC) on 27 April 2021.
[3] Appellants' Application to challenge ABC's determination of Request 2 – Hodson Developments (Ashford Ltd) & Ors v Ashford Borough Council & Anor - Queen's Bench Division, Royal Courts of Justice, Tuesday 22 March 2022. No.CO/4125/2021 Judgement
[4] Ashford Borough Council and Kent County Council

"Ground 3 is an argument that the planning authorities erred by not acceding to the developer's request for a variation of the indexation provision in the section 106 agreement. Again in my view, this is a hopeless argument in a planning judicial review. The indexation date was 2014 and Kent County Council, which appears to have been leading on this particular point, explains why the base date of April 2014 was taken. That was the date where the original planning balances were struck. The purpose of indexation is plain: in order to make sure that the infrastructure costs within the 106 can be met, and whether or not the indexation should change is again one for the local planning authority subject only to Wednesbury irrationality. There is simply no material here that would support a rationality challenge.

When pressed, Mr Letman accepted that the submissions his own client made in respect of indexation to the local authority before they made the decision were extremely thin. There have been further communications about indexation since, but that is post-decision material which cannot possibly form the basis of an error of law by the decision-makers. The claimant says that the indexation figure produces figures above the actual cost but I have seen absolutely no evidence to make that point good, even if it was a matter for the court."

3.3.4 Revising the base date would not serve the purpose equally well as it would result in contributions below that needed to provide the infrastructure and services necessary to meet the needs of the Development, because it would fail to take into account the Indexation between 2014 when the planning balance was struck and 2018 when development commenced on site. This would result in the additional burden of providing necessary infrastructure on the public purse and a failure to deliver the required infrastructure, which is unacceptable.

For example:

(a) Primary School 1 - the total S106 contribution for Primary School 1 (PS1) is £6m plus indexation. Applying indexation from April 2014 to March 2022 increases the amount to £7,845,569.62. PS1 has been built by KCC and opened on Site in November 2021. As at January 2024, the Appellants were advised by KCC that the anticipated total spend on this project would be £8,053,235.00, with the actual spend at January 2024 being £7,890,464.13. Thus, expenditure for the school provision is in excess of that provided by the total S106 contribution being indexed from April 2014. There is no evidence here that the indexation means that the contribution is in excess of current costs – indeed the point goes (albeit to a limited extent) the other way.

(b) Modifying the Indexation base date to August 2018 would result in the contribution for PS1 being £7,023,229.46 (indexed to March 2022). As shown above, this would result in the contribution being significantly less than it has cost the KCC to provide the school.

(c) The total contribution for the Secondary School is £22.5m plus Indexation. Indexed from April 2014 to March 2022[5], this equates to £29,420,886.08. The Department for Education (DfE) is currently building the school and has advised KCC that the cost will be in excess of £40m. The Development is therefore, contributing considerably less than the cost of providing the infrastructure necessary to meet the needs of the

[5] This date has been used as it accords with KCC's Developer Contribution Guide 2023. Contribution rates within the Guide (where quoted) have a base date of Q1 2022. It provides a comparison point for obligations from this Development.

Development. The key point is that the indexation is not excessive.

3.3.5 KCC has seen no evidence of any disconnect between the indexed sum and current costs and will comment on any such evidence if and when presented. The purpose of the indexes is that there the reflect the real world costs over time. That is there purpose and what they are designed to do. Accordingly as our examples above show there is no disconnect as the indexes already reflect the real world changes in costs.

3.3.6 The Appellants' request to vary Clause 28 by the addition of: *"Where any Index Linked payment required to be made under this Agreement by virtue of the Indexation results in that payment exceeding the cost of the item for which it is to be paid, the amount payable shall be reduced accordingly and only the amount reduced as aforesaid shall be payable"* is unnecessary. Schedules 15 (paragraph 48 and 49), 18A (paragraph 6), 16 (paragraph 10) and 25 (paragraph 5.2) all include covenants on KCC to provide either information relating to the actual cost of infrastructure provision and/or return of unspent monies to the Paying Owners. In any event the proposed amendment would not work as it contains no date or review/calculation mechanism to enable all parties at the date it is due to know the amount required to be paid. It therefore makes the obligation to pay uncertain to the point of unenforceability. As the facilities will inevitably be provided after payments it is impossible to know what they will cost in advance so the proposed modification is inoperable.

4. Conclusion

KCC maintains that the obligation at clause 28 of the S106 to index financial contributions from April 2014 (the date that the planning balance was struck) serves a useful purpose. Indexation ensures the contributions retain their real value over time, enabling KCC to deliver essential projects and infrastructure required to make the Development acceptable in planning terms and to support the Development. Without this there is a risk of significant funding gaps putting required infrastructure at risk. Modifying the base date, as proposed by the Appellants, would result in contributions falling short of what is required to meet these needs. This would place an unfair burden on the public purse and hinder KCC's ability to mitigate the Development's impact on the local community.